

REMARKS

The Office Action dated January 6, 2011, has been received and carefully considered. In this response, claims 26, 54, 63, 64, 69, and 73 have been amended. No new matter has been added. Entry of the amendments to claims 26, 54, 63, 64, 69, and 73 is respectfully requested. Reconsideration of the pending rejections in the present application is also respectfully requested based on the following remarks.¹

I. THE EXAMINER INTERVIEW

At the outset, the undersigned thanks the Examiner for the courtesies extended during the interview conducted on March 23, 2011, during which agreement was reached on the amended claims submitted herein overcoming the combination of references cited in a rejection set forth in the Office Action.

¹ As Applicants' remarks with respect to the Examiner's rejections are sufficient to overcome these rejections, Applicants' silence as to assertions made by the Examiner in the Office Action or certain requirements that may be applicable to such rejections (e.g., assertions regarding dependent claims, whether a reference constitutes prior art, whether references are legally combinable for obviousness purposes) is not a concession by Applicants that such assertions are accurate or such requirements have been met, and Applicants reserve the right to analyze and dispute such in the future.

II. THE OBVIOUSNESS REJECTION OF CLAIMS 26-29, 32, 38-47, 54-61, 63-65, 69, 71, AND 73

On pages 2-5 of the Office Action, claims 26-29, 32, 38-47, 54-61, 63-65, 69, 71, and 73 were rejected under 35 USC § 103(a) as being unpatentable over U.S. Publication No. 2003/0167380 ("Green") in view of U.S. Patent No. 6,598,131 ("Kedem"). This rejection is hereby respectfully traversed.

Under 35 U.S.C. § 103, the Patent Office bears the burden of establishing a prima facie case of obviousness. In re Fine, 837 F.2d 1071, 1074 (Fed. Cir. 1988). There are four separate factual inquiries to consider in making an obviousness determination: (1) the scope and content of the prior art; (2) the level of ordinary skill in the field of the invention; (3) the differences between the claimed invention and the prior art; and (4) the existence of any objective evidence, or "secondary considerations," of non-obviousness. Graham v. John Deere Co., 383 U.S. 1, 17-18 (1966); see also KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727 (2007). An "expansive and flexible approach" should be applied when determining obviousness based on a combination of prior art references. KSR, 127 S. Ct. at 1739. However, a claimed invention combining multiple known elements is not rendered obvious simply because each element was known independently in the prior art. Id. at 1741. Rather,

there must still be some "reason that would have prompted" a person of ordinary skill in the art to combine the elements in the specific way that he or she did. Id.; In re Icon Health & Fitness, Inc., 496 F.3d 1374, 1380 (Fed. Cir. 2007). Also, modification of a prior art reference may be obvious only if there exists a reason that would have prompted a person of ordinary skill to make the change. KSR, 127 S. Ct. at 1740-41.

Regarding claim 26, the Examiner asserts that the claimed invention would have been obvious in view of Green and Kedem. Applicants respectfully disagree. However, in order to forward the present application toward allowance, Applicants have amended claim 26 along the lines discussed during the Examiner Interview to more specifically define the claimed invention, and specifically those features that further differentiate the claimed invention from Green and Kedem, as well as the other cited references. In particular, Applicants respectfully submit that Green and Kedem, either alone or in combination, fail to disclose, or even suggest, a method for providing data comprising storing, in an original data store, details associated with all write commands directed to a primary data store during a time interval so as to accumulate backup data, each write command being stored when directed to the primary data store, wherein the details associated with all write

commands comprise an overwrite timestamp parameter, a primary data store location parameter, an original data store location parameter, and an overwritten data parameter; receiving a request to create a virtual data store that reflects a state of the primary data store at a specified time, the specified time being any point in time during the time interval that occurs prior to the creation of a snapshot of the primary data store; creating the virtual data store from data stored in the original data store; receiving a storage protocol request for data at a specified address in the virtual data store; and transmitting the requested data in response to the storage protocol request, as presently claimed. In contrast, Green is limited to creating snapshots of a system at particular points in time, and thus Green can only restore a system to defined snapshot points in time. Kedem, simply discloses intercepting read/write requests.

In view of the foregoing, Applicants respectfully submit that claim 26 should be allowable over Green and Kedem.

Regarding claims 27-29, 32, and 38-47, these claims are dependent upon independent claim 26. If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. In re Fine, 837 F.2d 1071 (Fed. Cir. 1988). Thus, since independent claim 26 should be allowable as discussed above, claims 27-29, 32, and 38-47 should also be

allowable at least by virtue of their dependency on independent claim 26. Moreover, these claims recite additional features which are not disclosed, or even suggested, by the cited references taken either alone or in combination. For example, claim 28 recites that "the original data store comprises a current store and a time store." Green and Kedem, either alone or in combination, fail to disclose or suggest this claimed feature.

Regarding claims 54, 63, 64, 69, and 73, these claims, while of differing scope and of different scope than claim 26, recite subject matter related to claim 26. Thus, the arguments set forth above with respect to claim 26 are equally applicable to claims 54, 63, 64, 69, and 73. Accordingly, it is respectfully submitted that claims 54, 63, 64, 69, and 73 are allowable over Green and Kedem for analogous reasons as set forth above with respect to claim 26.

Regarding claims 55-61 and 65, these claims are dependent upon independent claims 54 and 64, respectively. If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. In re Fine, 837 F.2d 1071 (Fed. Cir. 1988). Thus, since independent claims 54 and 64 should be allowable as discussed above, claims 55-61 and 65 should also be allowable at least by virtue of their dependency

on independent claims 54 and 64, respectively. Moreover, these claims recite additional features which are not disclosed, or even suggested, by the cited references taken either alone or in combination. For example, claim 59 recites "[t]he method of claim 58 wherein the original data store is implemented as a current store and a time store." Green and Kedem, either alone or in combination, fail to disclose or suggest this claimed feature.

In view of the foregoing, it is respectfully requested that the aforementioned obviousness rejection of claims 26-29, 32, 38-47, 54-61, 63-65, 69, 71, and 73 be withdrawn.

III. THE OBVIOUSNESS REJECTION OF CLAIMS 30, 31, 33-37, 48-53, 62, 66-68, 70, and 72

On pages 6-9 of the Office Action, claims 30, 31, 33-37, 48-53, 62, 66-68, 70, and 72 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Green in view of Kedem, and in further view of Official Notice. Applicants respectfully submit that the rejections under Green and Kedem and Official Notice are moot, given the above arguments with respect to the independent claims.

Applicants also continue to respectfully traverse the rejections of claims 30, 31, 33-37, 48-53, 62, 66-68, 70, and 72

in relying on Official Notice. Applicants traverse this rejection because there is no support in the record for the conclusion that the identified features are "old and well known." In accordance with MPEP § 2144.03, the Examiner must cite a reference in support of his position.

Furthermore, as a preliminary matter, Applicants respectfully assert that official notice may only be taken of facts, never of legal conclusions. See MPEP § 2144.03. In particular, it is always improper to take official notice of obviousness under 35 U.S.C. § 103. To the extent that the Office Action purports to take Official Notice of obviousness, the corresponding rejections are improper and must be withdrawn. See, e.g., Office Action, page 6 ("Examiner takes Official Notice that it would have been obvious and widely-known to one of ordinary skill in the art to use single protocol request packets.") (emphasis added).

The Office Action appears to assert as Official Notice that the following were well-known: (1) "the request to create the virtual data store is received in a different data packet than the storage protocol request;" (2) "the request to create the virtual data store is received in a different data packet than the storage protocol request;" (3) "the request to create the virtual data store is received via the storage protocol

request;" (4) "the storage protocol request comprises a standard read request;" (5) "the storage protocol request comprises a SCSI read request;" (6) "the storage protocol request comprises a Fibre Channel protocol request;" (7) "the data is transmitted substantially instantaneously in response to the storage protocol request;" (8) "the data is transmitted in less than 1 millisecond;" (9) "writing data to the virtual data store in response to a storage protocol write request;" and (10) "the virtual data store is generated within one second of the request to create the virtual data store." See Office Action, pages 6-9. Applicants respectfully traverse these assertions.

In particular, the contexts of the Examiner's assertions are entirely unclear. That is, the Examiner has not specified in what context the limitations at issue were allegedly well-known. The Examiner does not state the prior art system or method in which the officially-noticed facts would be found. For example, the Examiner has not stated whether the noticed facts in (1)-(10) have allegedly occurred in a virtual data backup system, and if so, the nature of the virtual data backup system. The Examiner has failed to disclose, for example, whether the noticed fact is alleged to have occurred in a system that may be considered analogous art. Without knowing the scope and system of (1)-(10), Applicants cannot properly respond.

That is, Applicants are prejudiced by the lack of clarity as to the metes and bounds of the allegedly noticed facts.

As is well known, "[t]he examiner must provide specific factual findings predicated on sound technical and scientific reasoning to support his or her conclusion of common knowledge. The Applicants should be presented with the explicit basis on which the examiner regards the matter as subject to official notice so as to adequately traverse the rejection in the next reply after the Office action in which the common knowledge statement was made." MPEP § 2144.03(B) (citations omitted). Here, Applicants have not been provided with any basis on which the Examiner regards the matters as subject to Official Notice. Moreover, Applicants cannot adequately traverse the purported combination of prior art patents and Official Notice, at least because the scope and context of the Official Notice is unclear. Accordingly, Applicants respectfully assert that the usage of Official Notice is improper and must be withdrawn.

In addition, regarding claims 30, 31, 33-37, and 48-53, these claims are dependent upon independent claim 26. Regarding claim 62, this claim is dependent upon independent claim 54. Regarding claims 66-68, these claims are dependent upon independent claim 63. Regarding claims 70 and 72, these claims are dependent upon independent claim 69. If an independent

claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. In re Fine, 837 F.2d 1071 (Fed. Cir. 1988). Thus, since at least independent claims 26, 54, 63, and 69 should be allowable as discussed above, dependent claims 30, 31, 33-37, 48-53, 62, 66-68, 70, and 72 should also be allowable at least by virtue of their dependency the independent claims noted above. In view of the foregoing, it is respectfully requested that the aforementioned obviousness rejection of claims 30, 31, 33-37, 48-53, 62, 66-68, 70, and 72 be withdrawn.

IV. CONCLUSION

In view of the foregoing, it is respectfully submitted that the present application is in condition for allowance, and an early indication of the same is courteously solicited. The Examiner is respectfully requested to contact the undersigned by telephone at the below listed telephone number, in order to expedite resolution of any issues and to expedite passage of the present application to issue, if any comments, questions, or suggestions arise in connection with the present application.

To the extent necessary, a petition for an extension of time under 37 CFR § 1.136 is hereby made.

Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account No. 50-0206, and please credit any excess fees to the same deposit account.

Respectfully submitted,

Hunton & Williams LLP

By: 

Thomas E. Anderson

Registration No. 37,063

TEA/vrp
Hunton & Williams LLP
1900 K Street, N.W.
Washington, D.C. 20006-1109
Telephone: (202) 955-1500
Facsimile: (202) 778-2201
Date: March 25, 2011